IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8716 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgment? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ABDULHAMID ABDULKADAR SHAIKH

Versus

COMMISSIONER OF POLICE

Appearance:

MR ANIL S DAVE for the Petitioner.

MS BANNA S DUTTA for Petitioner No. 1

MR KAMEN N SHUKLA for Petitioner No. 1

Mr.V.M.Pancholi, Assistant GOVERNMENT PLEADER, for Respondent No. 1-3

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 25/03/2003

ORAL JUDGEMENT

By filing this petition, the petitioner has challenged the detention order dated 16.8.2002, by which

brother of the petitioner is detained under the provisions of the Prevention of Anti-Social Activities Act, 1985 ("PASA", for short). Along with the same, the detenu is served with the grounds of detention of the same date. After having been satisfied about the activities of the brother of the petitioner, the brother of the petitioner has been detained by the Authority as a "Dangerous Person" under PASA. The said order is challenged in this petition.

On behalf of the petitioner, it is argued that, at the relevant time, the brother of the petitioner was in judicial custody, yet, he is detained under preventive detention. In this connection reference is required to be made to the detention order. At page 21 in the compilation, the detaining authority has stated in the order that the brother of the petitioner is in judicial custody in connection with a criminal case, but he is likely to be released on bail at any time.

In this connection, learned Advocate for the petitioner relied on the decision of the Apex Court in Amritlal & Others v. Union Government and others, AIR 2000 SC 3675, wherein the Honourable Supreme Court has held as under in paragraphs 4, 6 and 7 :-

> " ... ...
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> 4. In Agustin's decision (1994 Supp (1) SCC 597) (supra) this Court also placed strong reliance on an earlier but oft-cited decision of this Court in Binod Singh v. District Magistrate, Dhanbad, (1986) 4 SCC 416 : (AIR 1986 SC 2090 : 1986 Cri LJ 1959) wherein it was held that if a person is in custody and there is no imminent possibility of his being released therefrom, the power of detention should not ordinarily be exercised. This Court held that there must be cogent materials before the officer passing the detention order that the detenu is likely to be released on bail. The inference must be drawn from the available material on record and must not be the ipse dixit of the officer passing the order of detention. It is in this perspective as above, that the recording of the concerned officer in the matter under reference ought to be noticed and the same reads as below:-

"Even though prosecution proceedings under Narcotic Drugs and Psychotropic Substances Act, 1985 have been initiated against Shri Amritlal I am satisfied that there is compelling necessity in view of the likelihood of his moving an application for bail and in the event of his being granted bail, the likelihood of his indulging in illicit traffic in narcotic drugs as is evident from the trend of his activities, to detain him under the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988."

xxx xxx xxx

6. The requirement as noticed above in Binod Singh's case (AIR 1986 SC 2090 : 1986 Cri LJ 1959) (supra) that there is 'likelihood of the petitioners being released on bail' that however is not available in the reasonings as provided by the concerned officer. The reasoning available is the 'likelihood of his moving an application for bail' which is different from 'likelihood to be released on bail.' This reasoning, in our view, is not sufficient compliance with the requirements as laid down.

7. The emphasis however, in Binod Singh's case (supra) that before passing the detention order the concerned authority must satisfy himself of the likelihood of the petitioner being released on bail and that satisfaction ought to be reached on cogent material. Available cogent material is the likelihood of having a bail application moved in the matter but not obtaining a bail order.

... ..."

In the instant case, except mentioning in the

order that the brother of the petitioner is in judicial custody and that he may be released on bail at any time, the detaining authority has not stated as to on what basis he has formed the said opinion. It is required to be noted that even though the bail application was preferred, no order was passed. In the above view of the matter, and considering the judgment of the Apex Court, the order of detention is required to be set aside on the ground that the authority has not stated as on what basis the authority has reached the conclusion that the brother of the petitioner may be released on bail. Considering the aforesaid facts of the case, the detention order is required to be set aside.

This petition is accordingly allowed. The order of detention is quashed and set aside. It is ordered that the detenu, Abdulhafiz Abdulkadar Shaikh, be released forthwith unless he is required in connection with any other case. Rule is made absolute.

25th March, 2003 (P.B. Majmudar, J.)

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(apj)